IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE V.K. MOHANAN

WEDNESDAY, THE 27TH SEPTEMBER 2006 / 5TH ASWINA 1928

WA.No. 1893 of 2002

AGAINST THE JUDGEMENT IN OP.2306/2001 Dated 12/06/2002
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APPELLANT: PETITIONER IN OP

DR.MARYKUTTY JOSEPH, ASST.PROFESSOR IN
ORTHODONTICS DEPARTMENT OF ORTHODONTICS,
DENTAL COLLEGE, THIRUVANANTHAPURAM.

BY ADV. SRI.K.A.ABRAHAM
SRI.S.S.NAIR

RESPONDENTS: RESPONDENTS IN OP
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1. STATE OF KERALA REPRESENTED BY THE
SECRETARY TO GOVERNMENT, HEALTH AND FAMILY
WELFARE (B) DEPARTMENT, GOVERNMENT OF KERALA,
SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DIRECTOR OF MEDICAL EDUCATION,
KERALA STATE, THIRUVANANTHAPURAM.
3. THE DEPARTMENTAL PROMOTION COMMITTEE
(HIGHER), HEALTH AND FAMILY WELFARE (B)DEPARTMENT,
GOVERNMENT OF KERALA, TRIVANDRUM REPRESENTED BY
THE CONVENOR.
4. DR.M.JAYARAMA, ASSOCIATE PROFESSOR
IN ORTHODONTICS GOVERNMENT DENTAL COLLEGE,CALICUT.

R1 TO R3 BY GOVT PLEADER SRI BENNY GERVASIZ
R4 BY ADV. SRI.P.RAVINDRAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 16/08/2007, ALONG WITH WPC NO. 5510 OF 2004
WPC NO. 31184 OF 2005 WPC NO. 33468 OF 2005 ETC.
THE COURT ON 17/09/2007 DELIVERED THE
FOLLOWING:

K.S. RADHAKRISHNAN & V.K. MOHANAN, JJ.

W.A. No 1893 of 2002, W.P.C. Nos. 33468/05, 29748/05, 31184/05, 5510/04, and 15276/06

Dated: 17th September 2007

J U D G M E N T

Radhakrishnan, J.

We are in these cases concerned with the interpretation of Rule 5(b) of the Special Rules for the Kerala Dental Education Service, 1975 read with Rule 10 (ab) of Part II of the Kerala State and Subordinate Services Rules, 1958.

2. O.P. No 2306 of 2001 was preferred by the appellant in W.A. No 1893 of 2002 seeking a writ of certiorari to quash Ext. P8 revised select list by which fourth respondent was granted the date of assignment in the cadre of Assistant Professor earlier than the petitioner accepting her plea that she had acquired the qualification earlier than the petitioner when the vacancy in the post of Assistant Professor arose on 1.5.1988. Petitioner was appointed as Tutor in Dentistry on 26.7.1978 as per the advice of the Kerala Public Service Commission dated 4.7.1978. Fourth respondent was also advised by the Public Service Commission for the post of Tutor in Dentistry on 20.7.1981. At the time of joining duty petitioner possessed BDS qualification prescribed for the post of Tutor while the fourth respondent was having MDS qualification. Promotion post of Tutor was that of Assistant Professor. Qualifications prescribed for the post of Assistant Professor as per Rule 5 (b) of the Kerala Dental Education

Service Special Rules are as follows:

Category	Method	Qualifications
Assistant Professor	Promotion or Direct recruitment	1. BDS degree of any Indian University or equivalent qualification approved by the Dental Council of India 2. Post-graduate degree in the subject approved by the Dental Council of India 3. Teaching experience in the subject for three years.

Petitioner was provisionally promoted as Assistant Professor on 30.5.1990 in the vacancy which arose on 24.1.1990. Petitioner was assigned that date by the D.P.C as per Ext P2 select list. Fourth respondent was assigned the date 25.7.1991, the date on which Dr Jyothindra Kumar was relieved of his duties on his promotion as Associate Professor. Fourth respondent filed objections stating that she should have been given promotion on 1.5.1988 the date assigned notionally to Dr Harindranath. On the basis of the objection of the fourth respondent Ext P5 select list was revised and Ext P8 revised select list was published. In Ext P8 fourth respondent was given the date of assignment as 1.5.1988 whereas the petitioner was given the date of assignment as 31.10.1990. Petitioner challenged the revised select list of Lecturers fit for promotion as Assistant Professor before this court. Challenge was repelled by the learned single judge. Aggrieved by the same petitioner has filed W.A. No 1893 of 2002.

3. Common questions arise for consideration in all these cases. The first question which arises for consideration in these cases is as to the meaning of

the term `date of occurrence of vacancy' i. e., whether it is the deemed occurrence of vacancy when promotees were given notional dates of promotion or it is the actual date of occurrence of vacancy by relief of the holder of the post. The second question is as per Rule 5 (b) of the Kerala Dental Education Service Rules read with Rule 10 (ab) of the General Rules "teaching experience" required for promotion to the post of Assistant Professor in the Kerala Dental Education Service is to be the experience gained after the acquisition of post-graduate degree in the subject in view of Rule 10 (ab) of the K.S & S.S.R. Counsel on either side addressed arguments for and against the above mentioned prepositions placing reliance on various judicial pronouncements in support of their respective contentions.

4. Learned single judge in O.P. No 2306 of 2001 has taken the view that the claim of an aspirant for promotion should be decided with reference to the circumstance obtained on the date of occurrence of vacancy and held that it is trite law that any deviation therefrom would amount to acting counter to one of the fundamental principles of service jurisprudence. Learned judge expressed the view that the claim for promotion has to be decided with reference to the date of occurrence of vacancy, whether or not he has occupied that vacancy on the date of occurrence of the vacancy. Learned judge also examined the scope of the Special Rules for the Kerala Dental Education Service Rules read with Rule 10 (ab) of the General Rules and took the view that the provision in the general rules says that when a qualification is prescribed for a post, unless it is otherwise specified, the qualification must be one acquired after the acquisition of the basic

qualification. Government of Kerala following the above mentioned judgment issued clarification as per G.O. (P) No 272/05/H&FWD dated 27.10.2005 holding that as the Special Rules for Kerala Dental Education Service is silent on the question whether teaching experience has to be acquired before or after taking the Post Graduate degree, the provisions contained in Rule 10 (ab) in the General Rules are automatically applicable. It is stated that as per that rule experience should be the one after acquiring the basic qualification prescribed for the post. It was also stated that since there is no provision in the special rules whether the experience has to be acquired before or after acquiring the post graduate degree, Rule 10 (ab) has to be applied in every case. Government therefore clarified that hereinafter while considering the "teaching experience" for promotion to the post of Assistant Professor in Kerala Dental Education Service the provisions of Rule 10 (ab) of the General Rules have to be taken into consideration. Legality of the above notification is also under challenge in these cases.

5. Government in exercise of the powers conferred under sub-section (1) of Section 2 of the Kerala Public Services Act, 1968 read with Section 3 thereof framed Special Rules for the Kerala Dental Education Service. Rule 5 thereof prescribes the qualifications for the post of Assistant Professor which includes Post-graduate degree in the subject and teaching experience in the subject for three years. For the post of Tutor, qualification prescribed is B.D.S degree and hospital experience for six months as House Surgeon or Dental Surgeon and also registration with the State Dental Council. The Special Rules were framed

in conformity with the regulation framed by the Dental Council of India which was approved by the Central Government. A copy of the regulation has been produced as Ext P2 in W.P.C. No 31184 of 2005. Qualification prescribed for the post of Reader is B.D.S Degree with post-graduate qualification in the subject with three years teaching experience after post-graduation in the subject of specialisation. We have already extracted the qualification prescribed for the post of Assistant Professor. Post-graduate degree in the subject approved by the Dental Council of India is essential qualification for promotion as well as for direct recruitment to the post of Assistant Professor. So also teaching experience in the subject for three years is also an essential qualification for promotion to the post of Assistant Professor. It is clear from the qualification prescribed that teaching experience in the subject for three years is the experience gathered by a candidate after acquiring the post-graduate degree in the subject. Without acquiring the post-graduate degree in the subject the teaching experience in the subject for three years cannot be acquired.

6. The Special Rules for the Kerala Dental Education Service were framed in 1975 in conformity with the Dental Council of India norms then in force. Later in the year 1983 Dental Council of India framed Regulations prescribing qualifications for the post of Reader namely M.D.S Degree with three years teaching experience in the speciality after post-graduation as lecturer. Government in its clarificatory order dated 27.10.2005 have pointed out that the Special Rules for the Kerala Dental Education Services have not been amended so far to make it in line with the existing Dental Council of India norms. It is

stated that promotions were made as per the provisions in the Special Rules and in the case of promotion to the post of Assistant Professor, teaching experience in the subject for three years whereas in the Dental Council of India norms it is three years teaching experience in the speciality after P.G as Lecturer. It was noticed that during the previous years Government have given promotion to the Assistant Professor to a number of Lecturers who have got three years teaching experience but not after acquiring P.G. Government noticed that the same is in violation of the Dental Council of India Regulations. Further it is also noticed that the Special Rules for the Kerala Dental Education Service is silent, whether teaching experience has to be acquired before or after the acquisition of P.G., but the provisions contained in Rule 10 (ab) are equally applicable. As per the Special Rules experience should be after acquiring the basic qualification prescribed for the post. Rule 2 of the General Rules states that if any provision is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall in respect of that service prevail over the provision in the general rules. It was noticed that since there is no provision in the Special Rules whether the experience has to be acquired before or after acquiring the Post Graduate degree, Rule 10 (ab) has to be applied in every case. Rule 10 (ab) as we have already indicated should be read into with the Special Rules for the Kerala Dental Education Service. Rule 10 (ab) is extracted hereunder for easy reference.

> (ab) Where the Special Rules or Recruitment Rules for a post in any service prescribe the qualification of experience, it shall, unless otherwise specified, be one

gained by persons on temporary or regular appointment in capacities other than paid or unpaid apprentices, trainees and Casual Labourers in Central or State Government Service or in Public Sector Undertaking or Registered Private Sector Undertaking, after acquiring the basic qualification prescribed for the post;

Provided that the experience gained as factory workers on daily wages of a permanent nature may be accepted, if the service is continuous and not of a casual nature.

Rule 10 (ab) refers to "Special Rules". The expression "Special Rules" has been defined in the K.S & S.S.R in Rule 2 (16) to mean the rules in Part III applicable to each service or class of service. Sub-rule (ab) of Rule 10 was inserted by G.O.(P) No 194/81/P&ARD dated 27.01.1993 published as SRO No 591/93 in the Kerala Gazette No 13 dated 30.03.1993 and therefore at least from 1993 onwards there shall not be any dispute that where the Special Rules or Recruitment Rules for a post in any service prescribe qualification of experience, it shall, unless otherwise specified, be one gained by persons after acquiring the basic qualification prescribed for the post. Basic qualification for the post of Assistant Professor is Post graduate degree in the subject approved by the Dental Council of India. Since post-graduate degree in the subject is essential basic qualification for promotion to the post of Assistant Professor the candidate should have three years teaching experience in that subject on which he has got P.G degree and as per Rule 10 (ab) of the K.S & S.S.R it should be after acquiring that basic qualification prescribed for the post. Government vide clarificatory order dated 27.10.2005 has made it clear that "teaching experience" for promotion to the post of Assistant Professor in Kerala Dental Education Service, the provisions of Rule 10 (ab) of the General Rules have to

be taken into consideration. Accordingly the minimum teaching experience for promotion to the post of Assistant Professor in Kerala Dental Education Service will be three years after acquiring the post-graduate degree.

7. The scope of Rule 10(ab) of the General Rules came up for consideration before this court in Sirajudheen v. Kerala Public Service Commission (2001 (2) K.L.T 268). This court interpreted the said provision in the light of Section 213(4) of the Motor Vehicles Act, 1988 and took the view that the recruitment rules framed by the Central Government in exercise of powers conferred under Section 213 (4) would satisfy the definition of "recruitment rules" under Rule 10 (ab) of the Kerala State and Subordinate Services Rules and that the notification issued by the Central Government and Rule 10(ab) has to be read together to hold that working experience should be gained after acquisition of the basic qualification. Rule making authority in its wisdom felt that a candidate aspiring promotion to the post of Assistant Professor should have sufficient teaching experience in the subject for three years and should have post graduate degree in the subject approved by the Dental Council of India. Therefore a candidate should have post graduate degree in the subject as well as teaching experience in the subject. The expression "in the subject" relates to the educational qualification as well as the qualification of experience. Post graduate degree in the subject alone is not sufficient for appointment by direct recruitment or by promotion to the post of Assistant Professor. Candidate should have teaching experience in the subject for three years after acquiring the post graduate degree. That is the only manner in which qualification should be

understood when we apply Rule 10(ab) of the General Rules read with Rule 5 (b) of the Special Rules.

8. Language of the provision is clear and explicit and the court must give effect to it. whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. The apex court in Dr Ganga Prasad Verma and others v. State of Bihar and others (1995 Supp (1) S.C.C 192) held that since the appellant therein did not have speciality in M.Ch (Neurosurgery) he was not considered for promotion. The court held as follows:

> "Where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. The interjection of the preposition 'or' at the underlined place amounts to judicial legislation or supplying omission which is impermissible in the process of construction of the Regulation. So we cannot read the Regulation in the manner suggested by the counsel."

We have already emphasised the expression "in the subject" not only with regard to educational qualification of post graduate degree but also with regard to experience in the subject. The apex court in G. Sundareswararao v. Government of A.P and others (1996) 8 S.C.C. 234) was considering the scope of Rule 4 (b) of the A.P. Institute of Preventive Medicine Service ad Hoc Rules which prescribes "not less than five years' experience as post graduate in the analysis of the food". Interpreting the rule the apex court held as follows:

> "In view of that mandatory rule that the candidate must have not less than five years' experience as postgraduate in the analysis of food, the intendment of the rule is manifested that after acquiring post-graduation, one must necessarily have not less than 5 years' experience in the analysis of food. It would be relevant to mention that when the analysis of food for adulteration is to be made the Senior Scientific

> Officer is required to counter-test the report of the analyst sent in that behalf, the rule appears to have intended that he must have expert knowledge after acquiring post graduation and minimum period of not less than five years' experience has been prescribed and insisted under the rule. The words "not less than" furnish the legislative intention of mandatory character of five years' minimum experience after getting post graduation. Therefore, it being the legislative policy, it cannot be said that the rule is ultra vires or arbitrary."

Reference may also be made to the decision of the apex court in Government of Andhra Pradesh v. Dr R.Murali Babu Rao and another (AIR 1988 S.C. 1048) wherein the court examined the scope of the term "five years teaching experience" contemplated by Rule 5 of the A. P Medical and Health Service Special Rules. The court held that the expression "teaching experience" as defined in Rule 5 speaks of "teaching experience in the speciality concerned in a medical college or an institute recognised by the Medical Council of India after obtaining post graduate qualification as specified in Annexure II. The words used are "after obtaining post-graduate qualification"; which does not speak of the second post-graduate qualification.

9. We therefore find no infirmity in the clarificatory order dated 27.10.2005 issued by the Government when examined in the light of the principles discussed above. Even without the above mentioned clarificatory order dated 27.10.2005, Special Rules for the Kerala Dental Education Service would show that teaching experience for three years by a candidate should be

experience gained after the acquisition of post graduate degree in the subject concerned which is more explicit when we read the Special Rules along with Rule 10 (ab) of the General Rules which was inserted in the year 1993. That fact is further buttressed when we look at the Regulations framed by the Dental Council of India which says that the experience acquired must be after the post graduation in the subject or specialisation. Therefore at least from 1993 onwards, that is, when Rule 10(ab) was introduced in the General Rules the qualification teaching experience in the subject should be after the acquisition of the post graduate degree in the subject concerned and it is so declared. However, we find no reason to unsettle the things which are already settled, but the rights of the parties before us are to be regulated as per the declaration made by us in this judgment.

10. We have already indicated that the fourth respondent in O.P. No 2306 of 2001 has been rightly assigned the date 1.5.1988 in the post of Assistant Professor. Vacancy occurred on that date and not when the vacancy arose when promotions were effected from that post. It is not the notional date of promotion that is relevant but the date of occurrence of the vacancy which is relevant. If that be so, fourth respondent was correctly assigned the date 1.5.1988 the date on which the vacancy arose. In such circumstances, we are inclined to dismiss W.A. No 1893 of 2002. So also W.P.C. No 33468 of 2005, 15276 of 2006 and 29748 of 2005. W.P.C. Nos 31184 of 2005 and 5510 of 2004 would stand allowed and it is ordered that the rights of the parties are governed by Ext P6 clarificatory order (in WPC 31184/2005) and also on the

basis of the declaration made by us in this judgment. Respondents would work out the rights of the parties on the basis of the declaration given by us.

Sd/-

K.S. RADHAKRISHNAN
Judge

Sd/-
V.K. MOHANAN
Judge

17/09/2007
en/

[true copy]

APPENDIX

Ext.P1 - True copy of the order No G4/20509/98/DME dated 2.1.1999 issued by the second respondent to the petitioner

Ext.P2 - True copy of the order No G4-27858/2000/DME dated 28.12.2000 issued by the second respondent to the petitioner

Ext P3 - True copy of the order No G4-5129/04/DME dated 16.04.2004 issued by the second respondent to the petitioner

Ext P4 - True copy of interim order dated 16.11.2005 in WPC No 19029/2005 of this court.

Ext.P5 - True copy of Government order G.O.(P) No 272/05/H&FWD dated 27.10.2005

Ext.P6 - True copy of special rules for the Kerala Dental Education Service published as per SRO No 1066/75

Ext.P7 - True copy of interim order dated 8.11.2005 in WPC 31184/2005

Ext P8 - True copy of G.O.(Rt) No 3158/2005/H&FWD dated 4.11.2005 issued by the first respondent

Ext P9 - True copy of the Reference order dated 6.6.2006 in W.A.No 1893 of 2002

Ext.P10 - True copy of the judgment dated 12.06.2002 in OP 2306/2001 from which WA No 1893/02 arises

Ext.P11 - True copy of degree certificate dted 5.8.1989 issued by the University of Kerala

Ext.P12 - True copy of the proceedings of the Director of Medical Education No 64/16009/96 dated 09.09.1996 appointing the petitioner as Lecturer in Oral and Maxillofacial surgery

Ext.P13 - True copy of joining order No 223/96/DCT dated 13.09.1996 issued by the Principal, Dental College, Thiruvananthapuram to thepetitioner

Respondent's exhibits:

Ext.R4(a) - True copy of letter dated 25.2.2005

Ext.R4(b) - True copy of the letter dated 15.6.2005

Ext.R4(c) - True copy of letter dated 24.5.2005

Ext.R4(d) - True copy of proceedings of the second respondent dated 16.4.2004

Ext.R4(e) - True copy of the letter dated 8.9.2004

Ext.R4(f) - True copy of the clarificatory order dated 7.7.2006

[true copy]

W.P.C. No 29748 of 2005

Ext.P1 - True copy of order No G4/3522/2005/DME dt 21.3.2005 of the third respondent

Ext. P2 - True copy of final gradation list of lecturers/senior lecturers in Oral and Maxillofacial surgery under Medical Education Service as on 30.09.2004 published as per order No G4/17035/2004/DME dt 29.1.2005 of the third respondent

Ext.P3 - True copy of letter No 10464/B1/05/H&FWD dated 05.05.2005 of the first respondent

[true copy]

WPC 31184/2005

Appendix

Petitioner's exhibits:

Ext P1 - True copy of notification dated 27.10.1975

Ext.P2 - True copy of regulations prescribing the minimum basic qualification and teaching experience required for teachers dated nil

Ext. P3 - True copy of judgment in OP 2306/2001 on the file of this court dt 12.06.2002

Ext.P4 - True copy of judgment in WPC No 7024/200 on the file of this court dt 27.2.2004

Ext.P5 - True copy of judgment in WPC 4571/2005 dated 9.2.2005

Ext.P6 - True copy of order issued by the first respondent dated 29.10.2005

Ext.P7 - True copy of representation submitted by the petitioner to first respondent dated 20.05.2005

Ext.P8 - True copy of the representation submitted by the petitioner to the second respondent dated 26.10.2005

Ext.P9 - True copy of letter addressed by the Dental Council of India to the first respondent dated 25.2.2005

[true copy]

WPC No 5510 of 2004

Appendix

Petitioner's exhibits;:

Ext P1 - True copy of the Certificate issued by the University of Calicut conferring the degree of Master in Dental Surgery on the petitioner.

Ext. P2 - True copy of certificate issued by the Royal College of Surgeons of England and Royal College of Surgeons in Ireland

Ext. P3 - True copy of Certificate issued by the Royal College of Surgeons of England and the Royal College of Surgeons in Ireland

Ext P4 - True copy of Regulations prescribing Minimum Basic qualification and teaching experience prescribed by the Dental Council of India for the Dental Staff in Dental Colleges

Ext P5 - True copy of Special Rules for the Kerala Dental Education Service

Ext P6 - True copy of order dt 30.12.2003 issued by the second respondent

Ext P7 - True copy of select list for promotion to the post of Assistant Professor in Oral and Maxillofacial Surgery dated 20.1.2004 published in theKeala Gazette on 24.1.2004

Ext P8 - True copy of judgment dated 12.06.2002 in OP 2306 of 2001

Ext P9 - True copy of GO(Rt) No 243/2004H&FWD dated 24.1.2004

[true copy]

WPC 15276 OF 2006

Appendix

Petitioner's exhibits:

Ext P1 - True copy of degree certificate issued ;by the University of Kerala May 2003

Ext P2 - True copy of the Special Rules dt nil

Ext P3 - True copy of service details of the petitioner for the period from 1.1.2000 to 31.12.2004 dated 3.2.2006

Ext P4 - True copy of representation submitted by the petitioner dated 10.8.2005

Ext P5 - True copy of the interim order in WPC No 29786/05 dated 25.10.2005

Ext P6 - True copy of the government order dated 29.10.2005

Ext P7 - True copy of government order dated 9.6.2006

[true copy]